

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own)	
motion, to promulgate rules governing MISS DIG)	Case No. U-18078
underground facility damage prevention and safety.)	
_____)	

At the December 20, 2016 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER FORMALLY ADOPTING ADMINISTRATIVE RULES

On April 1, 2014, the Commission sought permission from the Office of Regulatory Reinvention (ORR), now the Office of Performance and Transformation (OPT), to adopt rules pursuant to the MISS DIG Underground Facility Damage Prevention and Safety Act, MCL 460.721 *et seq.* (MISS DIG). ORR approved the request on April 4, 2014, ORR# 2014-028 LR. The Commission submitted the draft rules to ORR and the Legislative Service Bureau (LSB) for informal approvals, which were granted on January 6 and 27, 2016, respectively. The Regulatory Impact Statement was approved on May 6, 2016.

On May 3, 2016, the Commission issued an order providing the public with an opportunity to comment on the proposed rules, and a public hearing was held on June 16, 2016. Three people made comments at the hearing. In addition, the Commission provided for written comments to be filed by June 30, 2016. Six parties filed written comments.

On July 22, 2016, the Commission issued an order approving the rules for submission to LSB and OPT for formal approvals, which were granted on September 15, 2016, and September 28, 2016, respectively. On September 28, 2016, the rules were filed with the Joint Committee on Administrative Rules (JCAR), which, by virtue of MCL 24.245a(1), had 15 session days to object to the rules by filing a notice of objection. On December 12, 2016, JCAR did not take any action to prevent the rules from being transmitted to the Secretary of State, and it waived the remaining session days. The Commission therefore has the authority to formally adopt these rules.

THEREFORE, IT IS ORDERED that the rules governing underground facility damage prevention and safety, attached as Exhibit A, are adopted and transmitted to the Office of Performance and Transformation for filing with the Secretary of State.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

Sally A. Talberg, Chairman

Norman J. Saari, Commissioner

Rachael A. Eubanks, Commissioner

By its action of December 20, 2016.

Kavita Kale, Executive Secretary

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

PUBLIC SERVICE COMMISSION

MISS DIG UNDERGROUND FACILITY DAMAGE PREVENTION AND SAFETY

Filed with the Secretary of State on

These rules become effective immediately upon filing with the Secretary of State unless adopted under section 33, 44, 45a (6), or 48 of 1969 PA 306. Rules adopted under these sections become effective 7 days after filing with the Secretary of State.

(By authority conferred on the Michigan public service commission by section 11 of 2013 PA 174, MCL 460.731(4)), and section 231 of 1965 PA 380, MCL 16.331, and Executive Reorganization Order Nos. 1996-2, 2003-1, 2008-4, and 2011-4, MCL 445.2001, MCL 445.2011, MCL 445.2025, and MCL 445.2030.)

R 460.11, R 460.14, R 460.17, R 460.20, R 460.24, R 460.28, R 460.32, and R 460.40 are added to the Michigan Administrative Code.

R 460.11 Definitions.

Rule 11. (1) As used in these rules:

(a) “Act” means MISS DIG underground facility damage prevention and safety act, 2013 PA 174, MCL 460.721 to MCL 460.733.

(b) “Civil fine” means a fine assessed by and paid to the commission for violations of the act.

(c) “Complaint” means a correctly completed damage prevention complaint form received by the commission not more than 270 days after the occurrence of an alleged violation of the act or 90 days after discovery of an alleged violation of the act.

(d) “Hearing” means a trial-like administrative proceeding before a presiding officer that is conducted under the commission’s rules of practice and procedure R 792.10401 to R 792.10448.

(e) “Underground facilities safety education and training” means relevant education as determined by the commission as part of the resolution of a complaint.

(f) “Violation of the act” means a finding of a failure to undertake a duty required by the act.

(2) A term defined in the act has the same meaning when used in these rules.

R 460.14 Duties of facility owners, facility operators, and excavators.

Rule 14. (1) A facility owner or facility operator shall do all of the following:

(a) Become and remain a member of the notification system as required under section 4(1) of the act, MCL 460.724(1).

(b) Participate in and pay the fees levied by the notification system as required under section 4(4) of the act, MCL 460.724(4).

(c) Respond to a ticket by the start date and time of the excavation or blasting as required under section 7(1) of the act, MCL 460.727(1).

(d) Provide notification to the notification system using positive response as required under section 7(3) of the act, MCL 460.727(3).

(e) Mark facilities in accordance with the uniform color code as required under section 7(2) of the act, MCL 460.727(2), without charging a fee as required under section 4(3) of the act, MCL 460.724(3).

(f) Mark a facility within 24 hours, not including hours on nonbusiness days, of receiving a notification from an excavator that previous marks have been covered or destroyed as required under section 7(4) of the act, MCL 460.727(4).

(g) Provide additional assistance if necessary as required under section 7(5) of the act, MCL 460.727(5).

(h) Respond to a damage notice or emergency notice as required under section 7(6) and (7) of the act, MCL 460.727(6) and (7).

(i) Construct new facilities after April 1, 2014 in a manner that allows their detection as required under section 7(8) of the act, MCL 460.727(8).

(2) An excavator shall do all of the following:

(a) Provide a dig notice to the notification system as required under section 5(1) and (2) of the act, MCL 460.725(1) and (2).

(b) Expose all facilities prior to blasting or excavating as required under section 5(5) of the act, MCL 460.725(5).

(c) Support or brace facilities as required under section 5(6) of the act, MCL 460.725(6).

(d) Provide notice, immediate additional notice, or emergency notice if necessary as required under section 5(7) to (12) of the act, MCL 460.725(7) to (12)

(e) Take reasonable protective measures in the event of facility damage as required under section 5(11) of the act, MCL 460.725(11).

(f) Provide white lining if necessary in advance of submitting a ticket to a facility owner or facility operator as required under section 5(13) of the act, MCL 460.725(13).

R 460.17 Complaint against person other than governmental agency.

Rule 17. (1) A person or the commission may initiate a complaint against a person, other than a governmental agency, alleging a violation of the act.

(2) Before filing a complaint, the complainant shall make a good faith attempt to settle the dispute with the respondent using any reasonable means of resolution acceptable to the involved parties.

(3) If the dispute is not settled, the complainant may complete and file the electronic complaint form that can be found on the commission's website, www.michigan.gov/mpsc, in compliance with the user instructions.

R 460.20 Initial commission determination of violation by person other than governmental agency.

Rule 20. (1) Upon receipt of a complaint concerning a person, other than a governmental agency, the commission shall review the complaint and any attached documentation and shall conduct any investigation the commission finds necessary to determine whether a violation of the act has occurred.

(2) If the commission determines that no violation of the act has occurred, the commission shall notify the complainant of this finding.

(3) After review of the complaint and any investigation, if the commission determines that a violation of the act has occurred, the commission shall notify the complainant and the respondent by first-class mail in a letter of notification of violation.

(4) The letter of notification of violation shall include a brief statement of the facts, a statement of the alleged violation of the act, the section of the law that was allegedly violated, any proposed civil fine, and the due date for the payment of the fine. A civil fine shall not exceed \$5,000.00 per violation.

(5) The commission may also propose that the person who violated the act receive underground facilities safety education and training to ensure future compliance with the act.

(6) In cases where a person has committed a first offense that does not involve injury, death, or significant property damage, and where the person admits responsibility without requesting a hearing, the maximum civil fine to be assessed shall not exceed \$500.00.

(7) At any time during the initial determination process, the commission and respondent may enter into an agreement on an appropriate resolution of the matter.

R 460.24 Hearing procedures for complaint against person other than governmental agency.

Rule 24. (1) If the respondent disagrees with the commission's determination that a violation of the act occurred or disagrees with the proposed fine or recommended underground facilities safety education and training, the respondent may file an answer, affirmative defenses, or counterclaims to the complaint and may request a hearing. Responsive pleadings shall be filed pursuant to R 792.10443.

(2) The commission staff shall schedule a hearing before a presiding officer and the hearing shall be conducted pursuant to R 792. 10401 to R 792.10448.

(3) If after a hearing the commission determines that a violation of the act occurred, the commission may order the responsible party to pay a civil fine and may order the responsible party to undertake underground facilities safety education and training to ensure future compliance with the act. The civil fine shall not exceed \$5,000.00 pursuant to section 11(2) of the act, MCL 460.731(2).

(4) Upon payment of the fine and completion of any mandatory underground facilities safety education and training, the complaint shall be closed.

Rule 460.28 Complaint against governmental agency by facility owner or operator.

Rule 28. (1) Before filing a complaint, a facility owner or operator shall make a good faith attempt to settle any dispute with the governmental agency that allegedly violated the act using any reasonable means of resolution acceptable to the parties.

(2) If the dispute cannot be settled, a facility owner or facility operator may initiate a complaint by completing and filing the electronic complaint form in compliance with the user instructions that can be found on the commission's website, www.michigan.gov/mpsc.

(3) A facility owner or facility operator filing a complaint against a governmental agency may seek a civil fine and, if applicable, damages from a governmental agency for a violation of the act.

R 460.32 Commission determination; hearing for complaint against governmental agency.

Rule 32. (1) Upon receipt of a complaint from a facility owner or facility operator against a governmental agency, the commission shall review the complaint and any attached documentation to determine whether a violation of the act has occurred.

(2) If, after review of the complaint and any investigation, the commission determines that no violation of the act has occurred, the commission shall notify the complainant of this finding.

(3) If the commission determines that a violation of the act has occurred, the commission shall notify the complainant and the governmental agency by first-class mail in a letter of notification of violation. The commission shall schedule a hearing before a presiding officer, which shall be conducted pursuant to R 792.10401 to R 792.10448.

(4) The presiding officer assigned to the matter may direct the parties to attempt settlement of the damages portion of the claim through nonbinding mediation or other form of alternative dispute resolution. Costs of alternative dispute resolution shall be borne by the parties.

(5) After an administrative hearing is completed, the commission may order a governmental agency to pay actual damages and a civil fine in accordance with section 12(3) of the act, MCL 460.732(3).

Rule 460.40 Collection of damage information and availability of records.

Rule 40. Facility owners, facility operators, or excavators shall provide damage information to the commission upon commission request to fulfill the damage reporting requirements under Section 11 (6) of the act, MCL 460.731(6). Proprietary or commercially sensitive information may be filed under protective order pursuant to procedures set forth under MCR 2.302(C).